

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAVID RAY WILLIAMS,

Plaintiff,

No. CIV S-04-2559 LKK KJM P

vs.

CSP-SOLANO, et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS

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Plaintiff is a California prisoner proceeding pro se with an action for violation of civil rights under 42 U.S.C. § 1983. This action currently is proceeding against defendants Parker, Rohrer and Solomon, all current and former California Department of Corrections and Rehabilitation (CDCR) employees, for alleged violations of plaintiff's Eighth Amendment rights. Four matters are before the court.

1. Suggestion of Death

On August 11, 2006, defendants filed and served a suggestion of death on the record as to defendant Parker, under Federal Rule of Civil Procedure 25(a)(1). That rule provides that plaintiff had 90 days within which to file a motion to substitute another party for defendant Parker. Plaintiff has not filed a motion for substitution. Therefore this court will recommend that defendant Parker be dismissed.

1 2. Motion For Temporary Restraining Order

2 On March 31, 2006, plaintiff filed a motion asking that the court order as follows:

3 1. That defendants Rohrer, Parker and Solomon provide plaintiff with “a  
4 medically appropriate course of conduct,” and

5 2. That the warden at CSP Solano (CSPS) “investigate why plaintiff was  
6 personally requested by [defendant] Dr. Rohrer on 3-9-006, which plaintiff was intimidated, and  
7 also was denied medical chronos that would have prevented plaintiff present and future pain and  
8 injury.” Mot. at 2-3.

9 More recently, plaintiff has informed the court that he has been released from  
10 prison. See Docket entry #81. Therefore, request number 1 is moot. Dilley v. Gunn, 64 F.3d  
11 1365, 1368 (9th Cir. 1995). Request number 2 is barely intelligible, and in any case also appears  
12 moot as a request for injunctive relief because plaintiff is no longer subject to health care in  
13 prison. Id. Therefore, the court will recommend that plaintiff’s March 31, 2006 motion be  
14 denied.

15 3. Motion To Dismiss Defendant Solomon

16 On April 20, 2006, defendants filed a motion to dismiss plaintiff’s claim against  
17 defendant Solomon, a prison doctor. In the motion, defendants argue that plaintiff failed to  
18 exhaust administrative remedies with respect to his claim against defendant Solomon prior to  
19 filing suit.

20 A motion to dismiss for failure to exhaust administrative remedies prior to filing  
21 suit arises under Rule 12(b) of the Federal Rules of Civil Procedure. Wyatt v. Terhune, 315 F.3d  
22 1108, 1119 (9th Cir. 2003). In deciding a motion to dismiss for a failure to exhaust non-judicial  
23 remedies, the court may look beyond the pleadings and decide disputed issues of fact. Id. at  
24 1120. If the district court concludes that the prisoner has not exhausted non-judicial remedies,  
25 the proper remedy is dismissal of the claim without prejudice. Id.

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1           The Prison Litigation Reform Act provides that “[n]o action shall be brought with  
 2 respect to prison conditions under section 1983 of this title, . . . until such administrative  
 3 remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). California prison regulations  
 4 provide administrative procedures in the form of one informal and three formal levels of review  
 5 to address plaintiff’s claims. See Cal. Code Regs. tit. 15, §§ 3084.1-3084.7. Administrative  
 6 procedures generally are exhausted once a prisoner has received a “Director’s Level Decision,”  
 7 or third level review, with respect to his issues or claims. Cal. Code Regs. tit. 15, § 3084.5. All  
 8 steps must be completed before a civil rights action is filed, unless a plaintiff demonstrates a step  
 9 is unavailable to him; exhaustion during the pendency of the litigation will not save an action  
 10 from dismissal. McKinney v. Carey, 311 F.3d 1198, 1200 (9th Cir. 2002). Defendants bear the  
 11 burden of proving plaintiff’s failure to exhaust. Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th  
 12 Cir.), cert. denied sub nom. Alameida v. Wyatt, 540 U.S. 810 (2003).

13           With respect to defendant Solomon, plaintiff alleges in his complaint that he  
 14 visited Solomon on October 19, 2004 for severe pain and lumps in his abdominal area and pain  
 15 in his lymph nodes. Plaintiff claims Solomon checked plaintiff for a hernia, told him the pain in  
 16 his lymph nodes was normal and gave plaintiff hemorrhoid medication. Compl. at 11.<sup>1</sup> In this  
 17 court’s May 19, 2005 order, the court construed these allegations to state a claim upon which  
 18 relief could be granted under the Eighth Amendment.

19           Defendants have provided evidence indicating that plaintiff did in fact file a  
 20 grievance concerning his claim against defendant Solomon. See, e.g., Mot. to Dismiss, Decl. of  
 21 Debbie Falconer at Ex. F. However, the evidence also indicates that plaintiff did not exhaust the  
 22 grievance process before filing this action on December 2, 2004, because he did not obtain a  
 23 “Director’s Level Decision” before that time. Id.

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 25           <sup>1</sup> Plaintiff makes other allegations concerning Solomon in his complaint. However, none  
 26 of these allegations amount to another claim upon which relief can be granted. See Compl. at 8-9  
 (describing appointments with Solomon and unobjectionable treatments).

1 In his opposition, plaintiff mostly discusses grievances he filed that do not  
 2 concern the claim before the court against defendant Solomon. In any case, plaintiff does not  
 3 allege that he completed the grievance process with respect to this claim, nor does plaintiff make  
 4 a showing that administrative remedies were otherwise not available to him when this action was  
 5 filed. See, e.g., Opp'n at 2-12 (docket no. 40; identifying only grievances initiated by plaintiff  
 6 before October 19, 2004). For these reasons, defendant Solomon's motion to dismiss should be  
 7 granted.

#### 8 4. Motion For Summary Judgment<sup>2</sup>

9 On August 31, 2006, defendants Rohrer and Solomon filed a motion for summary  
 10 judgment. Given that the court is recommending that defendant Solomon be dismissed, the court  
 11 need not reach defendants' argument concerning the remaining claims against defendant  
 12 Solomon. The motion as to defendant Rohrer is resolved below.

##### 13 A. Summary Judgment Standard

14 Summary judgment is appropriate when it is demonstrated that there exists "no  
 15 genuine issue as to any material fact and that the moving party is entitled to a judgment as a  
 16 matter of law." Fed. R. Civ. P. 56(c).

17 Under summary judgment practice, the moving party  
 18 always bears the initial responsibility of informing the district court  
 19 of the basis for its motion, and identifying those portions of "the  
 20 pleadings, depositions, answers to interrogatories, and admissions  
 21 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c). "[W]here the  
 22 nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary  
 23 judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers

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 25 <sup>2</sup> Under Local Rule 78-230(m) a party may file an opposition to a motion for summary  
 26 judgment and then the moving party may file a reply. On October 11, 2006, plaintiff filed a  
 response to defendants' reply without seeking leave to do so. Accordingly, this court has not  
 considered plaintiff's October 11, 2006 response.

1 to interrogatories, and admissions on file.” Id. Indeed, summary judgment should be entered,  
 2 after adequate time for discovery and upon motion, against a party who fails to make a showing  
 3 sufficient to establish the existence of an element essential to that party’s case, and on which that  
 4 party will bear the burden of proof at trial. See id. at 322. “[A] complete failure of proof  
 5 concerning an essential element of the nonmoving party’s case necessarily renders all other facts  
 6 immaterial.” Id. In such a circumstance, summary judgment should be granted, “so long as  
 7 whatever is before the district court demonstrates that the standard for entry of summary  
 8 judgment, as set forth in Rule 56(c), is satisfied.” Id. at 323.

9           If the moving party meets its initial responsibility, the burden then shifts to the  
 10 opposing party to establish that a genuine issue as to any material fact actually does exist. See  
 11 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to  
 12 establish the existence of this factual dispute, the opposing party may not rely upon the  
 13 allegations or denials of its pleadings but is required to tender evidence of specific facts in the  
 14 form of affidavits, and/or admissible discovery material, in support of its contention that the  
 15 dispute exists. See Fed. R. Civ. P. 56(e); Matsushita, 475 U.S. at 586 n.11. The opposing party  
 16 must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome  
 17 of the suit under the governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248  
 18 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n, 809 F.2d 626, 630 (9th Cir.  
 19 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could  
 20 return a verdict for the nonmoving party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433,  
 21 1436 (9th Cir. 1987).

22           In the endeavor to establish the existence of a factual dispute, the opposing party  
 23 need not establish a material issue of fact conclusively in its favor. It is sufficient that “the  
 24 claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing  
 25 versions of the truth at trial.” T.W. Elec. Serv., 809 F.2d at 631. Thus, the “purpose of summary  
 26 judgment is to ‘pierce the pleadings and to assess the proof in order to see whether there is a

1 genuine need for trial.’’ Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory  
2 committee’s note on 1963 amendments).

3 In resolving the summary judgment motion, the court examines the pleadings,  
4 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if  
5 any. Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed. See Anderson,  
6 477 U.S. at 255. All reasonable inferences that may be drawn from the facts placed before the  
7 court must be drawn in favor of the opposing party. See Matsushita, 475 U.S. at 587.  
8 Nevertheless, inferences are not drawn out of the air, and it is the opposing party’s obligation to  
9 produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen  
10 Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff’d, 810 F.2d 898, 902 (9th Cir.  
11 1987). Finally, to demonstrate a genuine issue, the opposing party “must do more than simply  
12 show that there is some metaphysical doubt as to the material facts . . . . Where the record taken  
13 as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no  
14 ‘genuine issue for trial.’” Matsushita, 475 U.S. at 587 (citation omitted).

15 On August 25, 2005, the court advised plaintiff of the requirements for opposing a  
16 motion pursuant to Rule 56 of the Federal Rules of Civil Procedure. See Rand v. Rowland, 154  
17 F.3d 952, 957 (9th Cir. 1998) (en banc), cert. denied, 527 U.S. 1035 (1999); Klinge v.  
18 Eikenberry, 849 F.2d 409 (9th Cir. 1988).

19 B. Plaintiff’s Allegations

20 In his December 2, 2004 complaint, which is signed under the penalty of perjury,  
21 plaintiff alleges that on December 12, 2003 plaintiff visited defendant Rohrer in the medical  
22 clinic at CSPS because plaintiff had been suffering from internal abdominal pain, and pain  
23 associated with infections and lumps around his abdominal area. Defendant Rohrer did nothing  
24 for plaintiff other than give him anti-bacterial soap. Compl. at 7-8.

25 In this court’s May 19, 2005 order, the court construed these allegations to state a  
26 claim upon which relief can be granted under the Eighth Amendment. In this court’s August 4,

2006 findings and recommendations, the court confirmed the only claim remaining against defendant Rohrer is plaintiff's claim that Rohrer was deliberately indifferent to plaintiff's serious medical needs on December 12, 2003.

C. Eighth Amendment Standard For Providing Inmates Medical Care

The Eighth Amendment demands that prison officials not act in a manner "sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976). An Eighth Amendment claim based on inadequate medical care has two elements, "the seriousness of the prisoner's medical need and the nature of the defendant's response to that need." McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992).

A medical need is "serious" "if the failure to treat the prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.'" Id. (quoting Estelle, 429 U.S. at 104).

Deliberate indifference to a medical need is shown when a prison official knows that an inmate has a serious medical need and disregards that need by failing to respond reasonably to it. See Farmer v. Brennan, 511 U.S. 825 (1994). "[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Id. at 837.

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1           D. Defendants' Argument And Analysis

2                     In his declaration, defendant Rohrer asserts the following occurred on December  
3 12, 2003:

4                     Plaintiff returned on December 12, 2003, for follow up. Plaintiff  
5 was concerned about recurrent abscess. I explained to plaintiff that  
6 abscess can sometimes be the result of colonization of the skin by  
7 staphylococcus bacteria. I prescribed antibacterial soap that would  
8 leave bacterial residue on the skin to combat colonization of the  
9 skin by staphylococcus.

8 Rohrer Decl. at ¶ 10.<sup>3</sup> Rohrer does not address plaintiff's assertion that he was suffering from,  
9 and complained of, internal abdominal pain.

10                    Based on the record before the court, the court finds that there is a genuine issue  
11 of material fact as to whether defendant Rohrer was deliberately indifferent to any internal  
12 injuries plaintiff may have been suffering on December 12, 2003. Accordingly, the court will  
13 recommend that defendants' motion for summary judgment be denied with respect to plaintiff's  
14 remaining claim against defendant Rohrer.<sup>4</sup>

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19                    <sup>3</sup> The Rohrer declaration is attached to the Woodbridge Guess declaration.

20                    <sup>4</sup> Defendants assert a number of objections to the evidence presented by plaintiff in  
21 opposition to their motion. The court need not rule on these objections as the information  
22 provided by plaintiff in his verified complaint is sufficient to defeat defendants' motion for  
23 summary judgment against defendant Rohrer. See Schroeder v. McDonald, 55 F.3d 454, 460  
24 (9th Cir. 1995) ("A verified complaint may be used as an opposing affidavit under Rule 56.").  
25 Defendants cite Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 n.11  
26 (1986) for the proposition that plaintiff may not rely upon his pleadings in order to defeat  
summary judgement. The Matsushita footnote, however, merely restates Rule 56(e) of the  
Federal Rules of Civil Procedure, which states that a party cannot rely on the "mere allegations or  
denials of his pleadings" in order to defeat summary judgment, but must present affidavits in  
support of his opposition. Plaintiff's complaint does not present "mere allegations or denials"  
but is presented in affidavit form. Compl. at 6.



1 In accordance with the above, IT IS HEREBY RECOMMENDED that:

- 2 1. Defendant Parker be dismissed;
- 3 2. Plaintiff's March 31, 2006 request for a temporary restraining order be denied;
- 4 3. Defendants' April 20, 2006 motion to dismiss be granted;
- 5 4. Defendant Solomon be dismissed; and
- 6 5. Defendants' August 31, 2006 motion for summary judgment as to defendant
- 7 Rohrer be denied.

8 These findings and recommendations are submitted to the United States District

9 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty

10 days after being served with these findings and recommendations, any party may file written

11 objections with the court and serve a copy on all parties. Such a document should be captioned

12 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections

13 shall be served and filed within ten days after service of the objections. The parties are advised

14 that failure to file objections within the specified time may waive the right to appeal the District

15 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

16 DATED: January 16, 2007.

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19 U.S. MAGISTRATE JUDGE

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